

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1214

To be argued by
STEVEN LLOYD BARRETT

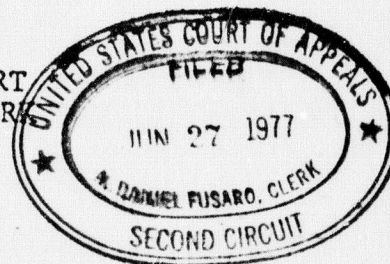
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
: UNITED STATES OF AMERICA,
: Plaintiff-Appellee,
: -against-
: KENNETH CHARLES DAVIS,
: Defendant-Appellant.
: -----x

B
P/s
Docket No. 77-1214

BRIEF FOR APPELLANT
AND PETITION FOR WRIT OF MANDAMUS

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,

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-against-

KENNETH CHARLES DAVIS,

Defendant-Appellant.

Docket No. 77-1214

BRIEF FOR APPELLANT
AND PETITION FOR WRIT OF MANDAMUS

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether appellant Davis should have been permitted to withdraw his plea of guilty when Presidential Proclamation 4483 pardoning draft resisters was issued shortly after the plea and precluded imposition of sentence.

2. Whether the indictment should be dismissed since this case, in which imposition of sentence is prohibited by Presidential Proclamation 4483, can never achieve finality in the form of judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt, U.S.D.J.) dated April 7, 1977, denying appellant Kenneth Charles Davis' motion to withdraw his previously entered plea of guilty of failing to appear for induction into the Armed Services (50 U.S.C.App. §462) under the first count of an indictment filed in the United States District Court for the District of New Jersey (Criminal No. 356-73) on June 1, 1973, and transferred to the United States District Court for the Eastern District of New York pursuant to Fed.R.Crim.Proc. 20(a) for plea and sentence (appeal taken pursuant to Fed.R.App.Proc. 4(a)). This is also an application for a writ of mandamus directing Judge Platt to vacate appellant Kenneth Charles Davis' plea of guilty, entered December 17, 1976, under the aforementioned indictment, and to transfer the papers in this case, pursuant to Fed.R.Crim.Proc. 20(c), to the United States District Court for the District of New Jersey (writ sought pursuant to Fed.R. App.Proc. 21(a)).

Appellant has not been sentenced in this action. By order dated April 7, 1977, Judge Platt ruled that Presidential Proclamation 4483 of January 21, 1977 (28 C.F.R. §0.35) precluded the sentencing of appellant. Appellant Davis is currently at liberty.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on the proceedings before this Court, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Kenneth Charles Davis was charged with failing to appear for induction into the Armed Services (50 U.S.C.App. §462) and for failing to keep his local board informed of his address (50 U.S.C.App. §462) in an indictment* filed in the United States District Court for the District of New Jersey. Pursuant to Fed.R.Crim.Proc. 20(a), the case was transferred to the United States District Court for the Eastern District of New York for plea and sentence.

On December 17, 1976, Mr. Davis entered a plea of guilty to the first count of the indictment. Mr. Davis acknowledged that he failed to appear for induction between September 10, 1970, and December 1, 1976 (Minutes of December 17 at 5-11).

President Carter's Proclamation 4483, granting a general pardon for violations of the Selective Service Act between August 4, 1964, and March 28, 1973, was issued and made effective January 21, 1977.** On that date, the court was awaiting

*The indictment is "B" to the separate appendix to appellant's brief.

**Presidential Proclamation 4483 is reproduced as "E" to the separate appendix to appellant's brief.

a pre-sentence report on Mr. Davis, and the effect of the pardon on Mr. Davis' pending case was debated on February 8, 1977.* Counsel, admitting his own lack of certainty as to the most appropriate procedures at this juncture, expressed his belief that the guilty plea should be allowed to be withdrawn (Minutes of February 8 at 4-6). The Assistant United States Attorney indicated that the Attorney General had directed that all outstanding indictments be dismissed with prejudice and that all investigations be terminated, and expressed his view that "your Honor has discretion to permit a defendant to withdraw the guilty plea in the interest of justice and the point of the matter under these circumstances, a fair argument can be made, a conviction under these circumstances would be unjust" (Minutes of February 8 at 8-12).

The court rejected the argument to allow withdrawal of the guilty plea advanced by both attorneys, noting at the outset that "I don't think a pardon is a reason for withdrawal" (Minutes of February 8 at 4). The court also made the following statements:

[This question] involves the separation of powers between the Executive and the Judiciary, it cuts right to the core of that problem. ---And the practice of the Executive to come in here and say we want to pardon everybody and so, therefore, your Honor, you must exercise your discretion in our favor is pure nonsense.

(Minutes of February 8 at 11.)

*Mr. Davis, who had been released on bail and was not advised to appear on this date, was not present.

Counsel filed his formal motion to permit Mr. Davis to withdraw his guilty plea on February 23, 1977, and on February 25, the date scheduled for sentencing, the court expressed its opposition to vacatur of the plea:

The question that is bothering me is that when a man has pled guilty and is awaiting sentence, and he is offered a pardon, in effect, how -- doesn't that institute a further admission of his guilt, and how, under those circumstances, is that just a vacation for the request to withdraw his plea of guilty?

(Minutes of February 25 at 4.)

The court added its belief that "[e]very pardon, regardless if it's general, has to be accepted" (Minutes of February 25 at 7). Though the court felt that it was empowered to sentence Mr. Davis and that granting a pardon to Mr. Davis only after sentence had been imposed would have been the proper method, it instead adjourned the proceeding (Minutes of February 25 at 7, 11).

The decision of the trial court was issued on April 7, 1977.* In its decision, the court, despite representations in counsel's motion to the contrary,** found that Mr. Davis did not wish to withdraw his guilty plea because to do so would constitute a waiver of the pardon by reason of denial of guilt (Appendix C at 3 and n.2). At the same time, the court agreed

*The decision is reproduced as "C" to the separate appendix to appellant's brief.

**Counsel's motion papers are set forth as "D" to the separate appendix to appellant's brief.

that sentence could not be imposed, basing this conclusion on the existence of a viable defense -- the pardon:

[T]he courts have repeatedly said in analogous situations that if a defendant has a defense for his crime and advances the same subsequent to the entry of a guilty plea but prior to sentence, permission to withdraw a guilty plea "should be rather freely granted," United States v. Joslin, 434 F.2d 526, 531 (D.C. Cir. 1970), and have reversed District Courts for abuse of discretion for failure to grant such permission where a defendant has a defense to assert. United States v. Young, 424 F.2d 1276 (3d Cir. 1970).

In many respects, this case presents an a fortiori situation to the case where a defendant bases his request for permission to withdraw his plea on the assertion of a legitimate defense. Hence this Court is of the opinion that, notwithstanding justifiable feelings with respect to the lack of fairness which has resulted herein, the defendant's plea of the Pardon in bar of any further proceedings in this case must be accepted. See United States v. Wilson, 32 U.S. 150, 160 (1833).

... Hence, the net result is that the guilty plea to the indictment stands, the Presidential Pardon stands in bar of execution thereon, and the case should be and hereby is marked "closed"

(Appendix C at 4-5).

At one point in the decision, the court revealed its underlying dissatisfaction with the effect of the pardon in general:

As to [whether it "would be an abuse of discretion for this Court to refuse to permit defendant to interpose the Pardon as a bar to further proceedings at this juncture"], this Court would not in the normal exercise of its discretion in a situation such as this which in the view of many will only result in a rank discrimination in favor

of the defendant and against many others who were similarly situated to him in August of 1970 because the defendant herein successfully eluded the authorities for several years whereas those similarly situated to him either served their country in its time of need or were forced to suffer punishment imposed on them for refusing to do so. In the eyes of a large part of our citizenry this is the type of manifest injustice that creates cynical disrespect for the law and for our country.

(Appendix C at 3-4).

ARGUMENT

Point I

APPELLANT DAVIS SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS PLEA OF GUILTY WHEN PRESIDENTIAL PROCLAMATION 4483 PARDONING DRAFT RESISTERS WAS ISSUED SHORTLY AFTER THE PLEA AND PRECLUDED IMPOSITION OF SENTENCE.

A. The court's assertion that appellant Davis did not wish to withdraw his plea of guilty on the theory that such action would revoke the pardon's applicability to him was in express disregard of Mr. Davis' motion to withdraw his guilty plea and was based on a legally erroneous premise.

The District Court's written opinion, contrary to its position espoused at the proceedings held on February 8, 1977, anomalously relies upon a purported desire by appellant Davis to allow his plea to stand as the basis for denying his motion to vacate his plea. First (Appendix C at 3), the court erroneously suggests that entry of a not guilty plea would constitute a waiver of the pardon, and concludes that this is "a result which the Court does not believe the defendant really wants." Then (Appendix C at 5), in the face of a plea withdrawal motion, the court concludes: "... [T]he Court has assumed (on the basis of defendant's counsel's assertion that the defendant has accepted the pardon and pleaded the same as

a bar) that the defendant does not wish to change his plea herein..." [footnote omitted]. Appellant Davis' motion of February 23, 1977 (Appendix D), however, expresses no reservations; it is an unequivocal request to permit him to withdraw his guilty plea. Since the court sets out no other basis for denying the request to withdraw the guilty plea, and presents arguments in favor of allowing plea withdrawal in analogous situations,* it should have honored appellant Davis' only expressed wish -- the withdrawal of his guilty plea.

The court's belief that withdrawal of the guilty plea would result in waiver of the pardon was neither correct nor relevant to its decision on appellant Davis' motion to withdraw his guilty plea. A pardon, as this proclamation was titled, is a remission of punishments imposed pursuant to a criminal judgment. Burdick v. United States, 236 U.S. 79, 94-95 (1915); see Ex Parte Garland, 71 U.S. 366, 371 (1867); Taran v. United States, 266 F.2d 561, 566 (8th Cir. 1959); Groseclose v. Plummer, 106 F.2d 311, 314 (9th Cir.), cert. denied, 308 U.S. 614 (1939); Petition of DeAngelis, 139 F.Supp. 779, 780 (E.D.N.Y. 1956); United States ex rel. Forino v. Garfinkel, 69 F.Supp. 846, 848 (W.D.Penn. 1947), reversed on other grounds, 166 F.2d 166 F.2d 887 (3d Cir. 1948). Since a judgment of conviction

*See District Court opinion (Appendix C at 4), citing United States v. Joslin, 434 F.2d 526, 531 (D.C. Cir. 1970), and United States v. Young, 424 F.2d 1276 (3d Cir. 1970). This question is addressed in Part B, infra.

entails imposition of sentence, Fed.R.Crim.Proc. 32(b), Mr. Davis does not stand convicted of a crime; his invocation of the pardon does not act to restore rights which were lost by reason of a judgment of conviction (§ 1, sub. 2) but acts to protect Mr. Davis from loss of these rights by barring imposition of sentence (§1, sub. 1) (see United States v. Wilson, 32 U.S. 150 (1833)). A convicted defendant must reject a pardon in order to assault the judgment because acceptance of the pardon is an accession and annulment of that judgment (see Marino v. I.N.S., U.S. Department of Justice, 537 F.2d 686, 692-693 (2nd Cir. 1976)). Mr. Davis, however, by seeking to withdraw a guilty plea prior to sentence, is not attacking a judgment, and may consistently accept the pardon's bar to sentence.

Moreso, the proclamation operates independently of Mr. Davis' acceptance; the amnesty policy is implemented by Executive Order 11967,** issued in conjunction with the proclamation. This order, inter alia, directs the Attorney General to discontinue pending prosecutions for violations of the Selective Service Act for the period specified; it need not be accepted because "its only purpose is to stay the movement of the law." Burdick v. United States, 236 U.S. 79, 95 (1915); see also United States v. Lockwood, 382 F.Supp. 1111, 1114 (E.D.N.Y. 1974). It is these

*Pursuant thereto, the Office of the Pardon Attorney, Department of Justice, has authority to issue an individual certificate of pardon upon application of a convicted draft evader. A copy of the application for an individual certificate of pardon is reproduced as "G" to the separate appendix to appellant's brief.

**A copy of Executive Order 11967 is set forth as "F" to the separate appendix to appellant's brief.

provisions which are applicable to appellant Davis, and hence, withdrawal of his guilty plea could not authorize a prosecution which has been categorically precluded.

By denying appellant Davis' motion to withdraw his guilty plea on the theory that such action would result in waiver of the pardon, the district court considered a consequence which was irrelevant and could not arise under the terms of the Presidential Proclamation. Assuming that the denial of Mr. Davis' motion to withdraw his guilty plea was done to accommodate Mr. Davis rather than to deny him his desired relief, this Court is requested, in light of the foregoing discussion, to order the plea vacated and the case remanded to the New Jersey district court.

B. It was an abuse of discretion for the district court to deny appellant Davis' motion to withdraw his plea of guilty in light of the existence of an irrefutable defense to prosecution and in view of the purposes and goals of the Presidential Proclamation.

Mr. Davis' motion to withdraw his guilty plea cited what the district court found to be an irrefutable defense. Moreso, to have allowed Mr. Davis to withdraw his plea of guilty would have been in accord with the public policy expressed in the proclamation -- an act of forgiveness to mitigate the penal effects of draft violations. Nor was there prejudice to the Government; in fact, the Government joined defense counsel's request

for plea withdrawal as appropriate. Therefore, the court's denial of Mr. Davis' motion constituted an abuse of discretion.

The existence of a defense to criminal charges which arises only after the guilty plea was entered is a valid reason for withdrawing the guilty plea prior to sentence. Cf. United States v. Guiliano, 348 F.2d 217, 222 (2d Cir.), cert. denied sub nom. Prezioso v. United States, 382 U.S. 939 (1965). The "fair and just" test applicable to pre-sentence motions to withdraw guilty pleas* favors withdrawal of Mr. Davis' plea. First, since the court below correctly ruled that the provisions of the Presidential Proclamation precluded sentencing Mr. Davis, plea withdrawal would not deny the Government a rightfully earned conviction -- there never can be a judgment of conviction (see Point II, infra). Second, vacatur of the plea of guilty will relieve Mr. Davis from the indefinite status of having against him an outstanding guilty plea, the collateral effect of which is far from clear (see Point II, infra). Third, in distinction to the case in which the Government asserts opposition to plea withdrawal on the basis of prejudice (see United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971)), the Government below agreed with the defense that plea withdrawal would be appropriate.

*Kercheval v. United States, 274 U.S. 220, 224 (1927); see United States v. Stayton, 408 F.2d 559, 560-562 (3d Cir. 1969); United States v. Guiliano, supra, 348 F.2d at 222.

The district court viewed Mr. Davis' irrebuttable defense of the pardon as establishing his claim a fortiori under United States v. Joslin, 434 F.2d 526, 531 (D.C. Cir. 1970), and United States v. Young, 424 F.2d 1276, 1280 (3d Cir. 1970).^{*} Here, given the district court's concession of the propriety of vacating the plea, its refusal to permit withdrawal of the guilty plea was a clearly erroneous abuse of discretion which this Court is empowered to rectify. United States v. Guiliano, supra, 348 F.2d at 221; United States v. Hughes, 325 F.2d 789 (2d Cir.), cert. denied, 377 U.S. 907 (1964).

Moreover, allowing the withdrawal of the plea would have been fair and just in view of the purposes and goals of the Presidential Proclamation. The President pardoned all convicted draft violators and curtailed prosecution for those crimes in order to mitigate the punitive measures taken against draft evaders in the past and in the future; in keeping with this expression of public policy, individual judicial remedies should, as far as predictable, lessen the criminal consequences and stigmas incident to draft prosecutions. Thus, Mr. Davis' plea should have been vacated, pursuant to his motion, so that his indictment could be dismissed under Executive Order 11967.

That the district court's denial of the plea withdrawal motion was rooted in its disagreement with the purposes and

^{*}Indeed, this was the reasoning which led the court to bar any further proceedings (e.g., sentencing).

effect of the Presidential Proclamation is evident from its statement at the February 8 proceedings (see Minutes of February 8 at 11) and in its written opinion (see Appendix C at 3-4), to the effect that the executive branch was encroaching on judicial prerogatives and that the result of the Presidential Proclamation was "a rank discrimination in favor of the defendant ... the type of manifest injustice that creates cynical disrespect for the law and for our country." These statements reveal a disagreement with the substance of the proclamation which disregards the President's authority to set such policy through the pardon power conferred in Art. I, §2, cl.2 of the United States Constitution. See Ex Parte Grossman, 267 U.S. 87, 120 (1925); Bishop v. United States, 223 F.2d 582, 588 and n.17 (D.C. Cir. 1955); Hoffa v. Saxbe, 378 F.Supp. 1221, 1231-1232 (D.D.C. 1974). Since the court's refusal to permit withdrawal of the guilty plea appears to have been grounded in concerns which were in conflict with the purposes and goals of the proclamation, this refusal constituted an abuse of discretion.

Point II

THE INDICTMENT SHOULD BE DISMISSED
SINCE THIS CASE, IN WHICH IMPOSITION
OF SENTENCE IS PROHIBITED BY THE
PRESIDENTIAL PROCLAMATION, CAN NEVER
ACHIEVE FINALITY IN THE FORM OF JUDG-
MENT.

"Final judgment in a criminal case means sentence. The sentence is the judgment." Berman v. United States, 302 U.S. 211, 212 (1937). "In the legal sense, a prosecution terminates only when sentence is imposed." Bradley v. United States, 410 U.S. 605, 609 (1973). "[A] void order purporting permanently to suspend sentence is neither a final nor a valid judgment." Miller v. Aderhold, 288 U.S. 206, 210-211 (1933).

Mr. Davis, as the court below recognized, cannot be sentenced for the draft violation to which he pleaded guilty because of the Presidential Proclamation and the accompanying Executive Order. Thus, if his plea is not vacated pursuant to Point I, he will remain in an unresolved state analogous to a permanent order of suspension of sentence except for the significant distinction that his sentence can never be imposed and a final judgment can never be entered against him. Cf. Miller v. Aderhold, supra, 288 U.S. at 210-211. This necessary lack of finality is grounds for dismissal of the indictment on either of two grounds: that the existence of an outstanding guilty plea for which sentence cannot be imposed violates Mr. Davis' Sixth Amendment rights; and that Executive Order 11967,

directing the Attorney General to dismiss all pending indictments for specified violators, expresses a legitimate intent to effect dismissal of indictments in all cases which had not proceeded to final judgment.

The Sixth Amendment right to a speedy trial has never been expressly applied to pre-sentence delay. See United States v. Roberts, 515 F.2d 642, 645 and n.4 (2d Cir. 1975). Nevertheless, as this Court noted in Roberts, the Supreme Court, in Pollard v. United States, 352 U.S. 354 (1957), was willing to assume arguendo that sentence may be "part of the trial for purposes of the Sixth Amendment"; and Fed.R.Crim.Proc. 32(a) recites: "Sentence shall be imposed without unreasonable delay." Application of two of the factors considered in Barker v. Wingo, 407 U.S. 514, 530 (1972), reveals that the delay, though now insubstantial, will continue endlessly, and that Mr. Davis, though not subject to a final judgment of guilt, may suffer many of the collateral consequences and stigmas of a convicted felon (see generally United States Department of Justice release, "Effect of Pardon;" * Carlesi v. New York, 233 U.S. 51 (1914)).** Allowing a guilty plea to stand which cannot be encompassed in a final judgment ultimately must lead to a pre-sentence delay

*A copy of "Effect of Pardon" is set forth as "H" to the separate appendix to appellant's brief.

**The other two factors considered in Barker v. Wingo, supra, -- the reason for the delay and the defendant's assertion of his right -- are not truly applicable in the unusual context of this case.

which offends the Sixth Amendment. In light of this inevitable deprivation, the requisite Sixth Amendment relief of dismissal of the indictment should be ordered (United States v. Roberts, supra, 515 F.2d at 646-646, n.6).

Alternatively, Executive Order 11967 is grounds for dismissal of the indictment. Though the directive to the Attorney General orders the dismissal of "pending indictments," rather than pending cases, the intention of the proclamation, supplemented by the order, is to provide meaningful termination of all cases -- from those under investigation to those in which sentence has been imposed -- and not to exclude from consideration that one class of case in which plea or verdict has been returned by sentence has not yet been imposed. It is evident, therefore, that the reference in subdivision one of the Executive Order to dismissal of pending indictments pertains to all cases which have not concluded in final judgment. Consistent with this policy, this Court should order dismissal of Mr. Davis' indictment.

Under either theory, Mr. Davis is deprived of substantial rights by this perpetually pending criminal prosecution. It is respectfully requested that, in light of the necessary lack of finality, this indictment be dismissed.

CONCLUSION

For the above-stated reasons, appellant Davis' indictment should be dismissed or his plea of guilty vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 27 , 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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